

Durham Research Online

Deposited in DRO:

29 July 2015

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Brooks, Thom (2017) 'Unlocking morality from criminal law.', *Journal of moral philosophy*, 14 (3). pp. 339-352.

Further information on publisher's website:

<https://doi.org/10.1163/17455243-01403001>

Publisher's copyright statement:

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

Unlocking Morality from Criminal Law

Thom Brooks

Abstract. This review article critically examines R. A. Duff and Stuart P. Green's wide-ranging *Philosophical Foundations of Criminal Law*. The book captures well a crucial debate at the heart of its topic: is morality a key for understanding criminal law? I first consider legal moralism arguments answering this question in the affirmative and argue they should be rejected. I next consider alternatives to argue that philosophers of criminal law should look beyond legal moralism for more compelling theories about criminal law.

Key words: criminal law, Duff, harm principle, legal moralism, morality, punishment

R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011, xv + 543 pp., ISBN 978 0 19 955912 2 (hbk.).

Introduction

Does the criminal law have a philosophical foundation? A common answer is that some view of morality provides a key for unlocking the criminal law. If we considered what might serve as the foundation for the criminalisation and even punishment of crimes like murder, theft or sex offences, the immorality of these crimes seems important and perhaps even crucial. But is it? Or should it?

Philosophical Foundations of Criminal Law is a ground-breaking work divided into four parts: criminal law and political theory, the substance of criminal law, international criminal law and a brief section on criminal procedures. The contributors include some of the most reputable and influential scholars in the field, including Andrew Ashworth, Mitchell Berman, Markus Dubber, Douglas Husak, Nicola Lacey, Michael Moore, the editors and many more. Their essays cover a suitably wide-range of topics and issues that is fitting for the diversity of their influential contributions to the field. Like most edited collections, there is no one view or perspective adopted throughout. The book claims to be foundational ‘in relation to the questions that it raises and clarifies, to the approaches to those questions that its contributors explore and develop, and to the further debates and inquiries that it hopes to provoke among criminal law theorists’.¹ The essays are generally excellent in this landmark volume that will be essential reading for anyone interested in this exciting area. Any critical comments about the field through this book’s essays should not mask my admiration for the authors and their contributions. This is a truly first-rate collection and the co-editors are to be congratulated for their efforts.

In this review article, I will not survey the full contents of this important collection as I cannot do full justice to the richness of the complete set of essays offered. Instead, I focus on a specific issue: the relationship between morality and the criminal law. In their introduction to this collection, R. A. Duff and Stuart P. Green reject the view that there is any one key to understanding the criminal law.² We have various perspectives that can bring insights whether they are philosophical, sociological or otherwise. Nonetheless, they support a ‘task of rational reconstruction’ that is somewhat ‘Herculean’ and look outwards ‘to some

¹ R. A. Duff and Stuart P. Green, ‘Introduction’ in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), p. 11.

² Duff and Green, ‘Introduction’, p. 2.

set of moral or political values that we can suppose the law to be embedded to embody'.³

This does not entail we construct theories of criminal law divorced from our current practices. On the contrary, 'any normative theorizing must begin from where we, the theorists, are, within our particular context; nor can we sensibly aspire to break free from all such contexts, to take a God's eye view or a view from nowhere, and articulate a universal normative theory of what the criminal law, as such, ought to be'.⁴

So in this vein, I will consider the general philosophy of criminal law as connected to our practical context while attempting to reveal normative insights into how our practical commitments should be best understood. The next section surveys some arguments in *Philosophical Foundations of Criminal Law* that defend a more legal moralist perspective. This is followed by a section considering arguments defending a more political viewpoint. My discussion will be wide-ranging without being exhaustive to advance the view that there is a balance between theory and practice to be struck and the legal moralists are on the wrong side. Whatever else the philosophical foundations of criminal law, legal moralist theories are too disconnected from our practices to foster a compelling view of the criminal law. Philosophers of criminal law should look elsewhere.

Legal Moralism and Criminal Law

The first perspective is legal moralism. This is broadly defined as the view that the criminal law and morality are intimately connected, and there is a clear link to the natural law tradition.⁵ Legal moralism is defended by R. A. Duff, the co-editor of *Philosophical*

³ Duff and Green, 'Introduction', p. 4.

⁴ Duff and Green, 'Introduction', p. 6.

⁵ See Thom Brooks, *Punishment* (New York: Routledge, 2012), pp. 6—10, 111—13 and John Stanton-Ife, 'The Limits of Law', *Stanford Encyclopedia of Philosophy* (2006, url: <http://plato.stanford.edu/entries/law-limits/>).

Foundations of Criminal Law. His piece defends a particular view about the relation of law and morality that I want to unpack and explore further:

The criminal law, in its substantive dimension, defines certain types of conduct as criminal . . . In so doing, it defines and condemns such conduct as wrong: not merely, and trivially, as legally wrong, as a breach of the rules of this particular game, but as morally wrong in a way that should concern those to whom it speaks, and that warrants the further consequences (trial, conviction, and punishment) that it attaches to such conduct. To say that it defines such conduct as wrong is not, however, to say that it creates that wrongfulness: although it is trivially true that criminal conduct is criminally wrongful only because the criminal law so defines it, it is substantively false to say that such conduct is morally wrongful only because the criminal law defines it as wrong. The criminal law does not (cannot) turn conduct that was not already wrongful into a moral wrong: it does not determine, but presupposes, the moral wrongfulness of the conduct that it defines as criminal; it determines which pre-criminal wrongs should count as ‘public’ wrongs whose perpetrators are to be called to public account.⁶

For Duff, what is ‘criminal’ is not only legal wrong, but it is also ‘morally wrong’. Duff denies that the conduct identified as criminal is morally wrong because it is criminal. He says: ‘We do not need the criminal law to tell us that rape, murder, and other attacks on the person are wrong’ and so should be criminalised.⁷ The criminal law does no more than select which pre-criminal wrongs for itself. In other words, the wrongs we include in our criminal law are wrong prior to our creating the criminal law. Moral wrongs would exist in a society without any law. Only moral wrongs can be incorporated within the criminal law, but not all

⁶ R. A. Duff, ‘Responsibility, Citizenship, and Criminal Law’ in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), p. 127.

⁷ Duff, ‘Responsibility, Citizenship, and Criminal Law’, p. 127.

moral wrongs are criminalised.⁸ This raises important questions about how these pre-criminal (and pre-societal?) wrongs came into being, if they even exist, and what might explain changes in our understandings of these wrongs over time—although I will bracket this issue because it is not examined in this piece.⁹

We need a test to determine which moral wrongs should count as criminal and which do not. Duff's test is that only those wrongs where 'perpetrators are to be called to public account' should be part of the criminal law.¹⁰ To be held to 'public account' does not entail that conduct must be performed in public and Duff includes receiving even a formal caution as being held publicly.¹¹ This test seems to suggest that the wrongs are more substantial than not to warrant their meriting potential public accountability, but the standard remains somewhat vague and unclear how it might be applied.

Crimes that are wrong, but not immoral would cause serious problems for legal moralist views like Duff's. He accepts that crimes are wrong independently of their criminalisation, that they are *mala in se*. These offences are typically claimed to include murder, theft and rape because they are often thought wrongful whether or not a state criminalises them. Other crimes are thought to be *mala prohibita*, such as drug offences and traffic offences. Driving a few miles above a speed limit might increase risks to other drivers for many motorists, but it is not obviously true this is the case for expert stunt drivers or Formula One champions. These *mala prohibita* offences are thought to only be wrongful

⁸ See Duff, 'Responsibility, Citizenship, and Criminal Law', p. 133.

⁹ The point that I wish to raise is that what counts as a pre-criminal wrong independently of its being illegal can change depending on when and where this is considered. The list of such wrongs may vary over time and across different communities. For example, wizardry and sodomy would be included if considered two centuries before in most, if not all, legal communities, but now none or only some might do so. If such wrongs are to have an importance for how we understand the content of the criminal law, then we need to have some theory to explain their substance in light of apparent change over time and the fact of reasonable pluralism. Insofar as these issues are not considered, this raises deeper worries about Duff's legal moralism that I cannot consider further here and only indicate my worry.

¹⁰ Duff, 'Responsibility, Citizenship, and Criminal Law', p. 127.

¹¹ Duff, 'Responsibility, Citizenship, and Criminal Law', p. 128.

because they are illegal. Nor is it clear that possessing a substance like cannabis is immoral prior to its criminalisation in U.S. states where it is banned, but not in U.S. states where it is now legalised.

These *mala prohibita* crimes cause problems for legal moralists and they deny such crimes exist. If some offences are wrongful only because they are prohibited by law, then not all crimes are wrongful independently of their illegality and the link between law and morality is incomplete, if not inapplicable. So if there were no *mala prohibita* crimes, then legal moralism would be able to claim morality has a clear link to criminal law.

Duff acknowledges this problem facing legal moralist views like his. He claims there are two paths to criminalisation. The first is by identifying potential *mala in se* offences that are wrongful independent of their illegality. The second is more vague and ‘starts with a decision that we have a reason to regulate a particular type of conduct, a reason that does not depend on the wrongfulness of the conduct’.¹² For example, we might choose to regulate driving speeds.¹³ Duff argues that ‘we have good reason to criminalize such breaches if and only if, given the regulation and its justification, a breach of it constitutes a moral wrong for which the perpetrator should be called to public account’.¹⁴ Some crimes might only wrongs in relation to fellow citizens, such as ‘electoral misconduct’ or failing to pay taxes owed.¹⁵ So Duff’s legal moralism retains morality as the key to unlocking what is criminal by claiming all criminal offences are either wrong independently of their criminalisation or there is some ‘good reason’ to criminalise.

One problem with Duff’s analysis is that it seemingly divides offences into one group (*e.g.*, *mala in se* offences) that are inherently wrongful and a second group of the rest for

¹² Duff, ‘Responsibility, Citizenship, and Criminal Law’, pp. 128—29.

¹³ See Duff, ‘Responsibility, Citizenship, and Criminal Law’, p. 129.

¹⁴ Duff, ‘Responsibility, Citizenship, and Criminal Law’, p. 129.

¹⁵ Duff, ‘Responsibility, Citizenship, and Criminal Law’, p. 142.

which we merely have some good reason to include them in the criminal law. This division is a concern because it a crime's being inherently wrongful is not what matters most: the key is what we have good reason to criminalise and not just that conduct is wrongful independently of criminalisation. The fact a crime is wrongful in this way could serve as a good reason for its criminalisation, but the true test then is whether conduct meets the standard of a good reason for criminalisation whatever that might be. So this division between offence groups seems false. If there is some difference between these groups, it is curious that it is unclear how this is captured by punishment—for example, by punishing crimes of one group generally more than another to reflect their difference. But this also does not seem the case and so a further reason why this difference seems false.

A second problem with Duff's analysis is its understanding of morality. For Duff, we can identify a coherent conception of 'wrongfulness': the punishment of offenders can express 'our' public denunciation to them for which offenders can communicate their secular penance.¹⁶ But society rarely speaks with such a voice, as H. L. A. Hart argues:

it is sociologically very naïve to think that there is even in England a single homogeneous social morality whose mouthpiece the judge can be in fixing sentence . . . Our society whether we like it or not, is morally a plural society; and the judgements of the relative seriousness of different crimes vary within it far more than this simple theory recognizes.¹⁷

Our present age is characterised by the fact of reasonable pluralism in every society. The moral reasons in favour of criminalisation, conviction, sentencing and release from custody can differ widely even where there is general agreement on outcomes. For example, both the

¹⁶ See R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).

¹⁷ H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon, 1968), p. 171.

retributivist and utilitarian can agree that murderers should be executed, but each will have very different reasons for their judgements. Duff's discussion of morality fails to account sufficiently for society's normative diversity. There is no single moral view all accept, but a sea of normative difference. This is not to deny that the criminal law may embody normativity, but it does deny that the normative views of any society support any single moral view.¹⁸ Such worries for Duff's legal moralism exist because these considerations are absent from his account.

Duff is the leading legal moralist today, but he is not alone in defending this position in *Philosophical Foundations of Criminal Law*.¹⁹ Legal moralism can take other forms, such as defending a particular moral principle as central to determining whether conduct is criminal. One such principle is the harm principle and it is perhaps the most influential such principle. John Stuart Mill's original formulation focuses on the possibility of an individual's causing harm to another is sufficient to constrain his freedom:

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.²⁰

Mill's harm principle supports the view that we should criminalise conduct that threatens or inflicts harm to others. This moral perspective prioritises the importance of harming over

¹⁸ See Thom Brooks, 'Legal Positivism and Faith in Law', *Modern Law Review* 77 (2014), pp. 139—47.

¹⁹ See Matt Matravers, 'Political Theory and the Criminal Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 67—82; Michael Moore, 'Intention as a Marker of Moral Culpability and Legal Punishability' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 179—205 and Kenneth W. Simons, 'Understanding the Topography of Moral and Criminal Law Norms' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 228—52.

²⁰ John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (Indianapolis: Hackett, [1859] 1978), p. 9.

motivation: unintended harms may be thought less wrong than intentional harming, but both would count as immoral conduct that may require sanctions.

This perspective is developed further by Victor Tadros in his contribution to this volume.²¹ He argues that we first consider whether conduct is permissible and, if so, only then consider motivations to determine the level of an individual's blameworthiness. Tadros claims the harm principle is our guide to ascertaining permissible conduct:

Whether something is permissible or not is to be determined by the harm that it causes. Hence, the harm principle is still commonly regarded as the standard principle that must be satisfied to warrant criminalization. If and only if principles of criminalization are satisfied do we turn to the fault requirements that must be satisfied to render the defendant liable to a criminal conviction for his conduct.²²

Like Duff, Tadros does not believe all immoral conduct should be criminalized or punished. White lies can be tolerated, but murder cannot. Duff and Tadros differ on where they demarcate non-criminal immorality from criminal immorality. Duff claims the latter constitutes conduct where individuals should be held publicly to account, even if only a brief verbal warning from a traffic officer. Tadros claims that our conduct must at least be harmful to consider criminalisation and then we apply a second test of considering an individual's motivations to determine relative blameworthiness for possible punishment. So Tadros's moral standard appears more stringent than Duff's.

But there remain serious concerns for Tadros's account. This view of harm is both overinclusive and underinclusive. It is overinclusive in its including too much as harms. Few argue all harms to others should be criminalized. Conduct like dangerous play in sports,

²¹ See Victor Tadros, 'Wrongdoing and Motivation' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 206—27.

²² Tadros, 'Wrongdoing and Motivation', 207.

invasive surgery and prize fighting are activities where a person can be harmed. Tadros seems to argue that this conduct would not be criminal because while it meets a first test of harm to others it fails a second about our motivations in interacting with others. There is a difference between prize fighting and a street brawl. Prize fighters box in a ring according to agreed rules that all consent to, but street brawlers need have no such agreements: the former is a widely recognized sport while the latter is commonly viewed as pure violence.²³ Tadros does not appear to accept that prize fighting should be punished because boxers consent to participate, but it does involve an intentional harm to others meeting his first step: it is unclear if such conduct is ‘wrongful, but unpunishable’.²⁴ If so, Tadros’s understanding of harm’s importance for the criminal law may be too wide.²⁵

But this view of harm is also underinclusive. This is because it does not appear to include much conduct that would be criminalised by most of us. So-called self-regarding harms seem a particular problem for this view and they interestingly fall outside much of the discussion. These are harms to one’s own self. Crimes of this variety are thought to include many drug offences and perhaps prostitution. The harm, if any, is to the person using the drug or engaging in sex work. Self-regarding offences are controversial insofar as some might deny their moral relevance for criminalisation: for example, a libertarian defending the importance of autonomous consent might deny I can harm myself where I autonomously consent to subject myself to risks. Other offences might not harm anyone, such as driving in the wrong direction on a one way street or illegal parking—especially if, in fact, no one is

²³ I grant this example has limitations. I oppose the legality of boxing, but use this illustration because few I have met share my views about its wrongfulness.

²⁴ Paraphrasing Immanuel Kant, *The Metaphysics of Morals*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), p. 28.

²⁵ See Andrew Ashworth and Lucia Zedner, ‘Just Prevention: Preventative Rationales and the Limits of the Criminal Law’ in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 279—303 and Thom Brooks, ‘Criminal Harms’ in Thom Brooks (ed.), *Law and Legal Theory* (Boston: Brill, 2014), pp. 149—61 for different views of how harms might relate to the criminal law.

affected by my conduct.²⁶ Such cases of self-regarding offences and what we might call *harmless offences*, if they exist, cause problems for Tadros's account because they appear to fall outside his account of the criminal law. This opens a gulf between his account and a wide number of offences that about every criminal code includes—and which many of us would include in our understanding of what does and should constitute the criminal law. So Tadros may offer a more stringent view of how law and morality relate than Duff, but legal moralism remains problematic.

Against Legal Moralism

Philosophical Foundations of Criminal Law contains several insightful pieces developing a broadly legal moralist understanding of criminal law as discussed in the section above. Duff, a co-editor, is a chief proponent of this view. Curiously, his co-editor Stuart Green raises some interesting challenges to legal moralism that begin to lead us away to other more convincing alternatives. This section focuses on these arguments against legal moralism found in this collection.

Green considers what he calls 'just deserts in unjust societies'.²⁷ Most legal moralists are retributivists and so they accept a connection between desert and proportional punishment.²⁸ Individuals deserve punishment for the moral wrongdoing they brought about

²⁶ I do not deny that driving down a one way street in the wrong direction or illegal parking can affect others. It may increase risks to safety or at least cause inconvenience. But this is not necessarily true for every case. If no one was driving on the street, no one was present and no one was aware, then my driving the wrong direction on a one way street would not affect others. It might even be morally defended if my doing so helped me rescue another in distress or more swiftly get someone to a hospital for urgent treatment.

²⁷ Stuart P. Green, 'Just Deserts in Unjust Societies: A Case-Specific Approach' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 352—76. See Jeffrie Murphy, 'Marxism and Retribution', *Philosophy and Public Affairs* 2 (1973): 217—31.

²⁸ While Duff defends what he calls a communicative theory of punishment, I have elsewhere argued that his theory is essentially retributivist because punishment is only to be distributed to the deserving in relation to what is deserved not unlike many retributivist penal theories. Duff's communicative theory is not clearly distinctive from retributivism in certain fundamental respects. See Brooks, *Punishment*, pp. 101—22. On retributivism

and punished in proportion to their desert. Retributivism considers each offender individually to determine how much desert he possesses. If I am fully responsible for a grave wrong like murder, then retributivism would find me deserving a fittingly severe punishment.

Green examines this view of just deserts in the non-ideal conditions that characterise many communities. He argues we should consider individuals on a case by case basis in viewing the relationship between retribution and socio-economic justice. The fact that an offender is ‘deeply and unjustly disadvantaged might be relevant to determining his blameworthiness for committing one kind of criminal offence (say, an offence against the person) but not another (say, an offence against property or against the administration of justice’ or *vice versa*.²⁹ Unjust disadvantage may or may not matter for determining what is deserved depending on the specific context, ‘the precise form that the offender’s disadvantage takes’.³⁰ Someone denied reasonable opportunities to obtain shelter might be a crucial factor for considering her blameworthiness for committing a relevant offence or perhaps form a basis for an excuse defence.³¹

Green’s analysis differs substantially from Duff’s legal moralism. For Duff, society has no more right to prosecute and punish an impoverished and excluded defendant who committed a serious *mala in se* offence than it would to prosecute an impoverished defendant that committed a much less serious *mala prohibita* offence according to Green.³² Green’s critique exposes a new problem for legal moralism: that it considers the morality of individuals equally and gives no weight to how factors like background considerations of socio-economic justice impact on them, which it does. So even if legal moralism could

more widely, see Brooks, *Punishment*, pp. 15—34 and Mitchell N. Berman, ‘Two Kinds of Retributivism’ in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 433—57.

²⁹ Green, ‘Just Deserts in Unjust Societies’, p. 353.

³⁰ Green, ‘Just Deserts in Unjust Societies’, p. 353.

³¹ See Green, ‘Just Deserts in Unjust Societies’, p. 359.

³² Green, ‘Just Deserts in Unjust Societies’, p. 364.

cohere better with the criminal law, it still has a problem accounting for the realities within which crimes may take place.

A more direct critique of legal moralism is by Malcolm Thorburn. He argues that Duff's 'new-fangled legal moralism cannot succeed . . . because it is premised on trying to turn criminal justice into something that it is not . . . the legal moralist view just does not fit with existing doctrine'.³³ Thorburn argues there is a difference between legal systems and private moral practices. The criminal law is an institutional system, but our private moral practices are not. We might speak of punishing a child or perhaps a pet for their disapproved conduct. But private moral practices may differ widely from one home to the next on what is disapproved, whether this standard is consistent and what consequences may follow. This is different in kind and character from legal punishment following a criminal law inclusive of all, where there are institutional compromises and precedents, and an appeal process.

In response, Thorburn defends a public law account of criminal justice. This perspective is more positivist insofar as it seeks to provide 'a much better fit with existing doctrine than the moralist alternative'.³⁴ But rather than focus on a *moral* justification of criminal justice, it is centred on a *political* justification.³⁵ The difference is that many claims about the justification of the criminal law are concerned with the justified exercise of coercive state power. Legal moralism is a problem because it can 'ignore the many ways in which the criminal law regulates public power'.³⁶

Thorburn is correct to highlight the political nature of the criminal law.³⁷ His public law perspective is useful in keeping us grounded in the criminal law as part of a particular

³³ Malcolm Thorburn, 'Criminal Law as Public Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), p. 23.

³⁴ Thorburn, 'Criminal Law as Public Law', p. 24.

³⁵ See Thorburn, 'Criminal Law as Public Law', p. 37.

³⁶ Thorburn, 'Criminal Law as Public Law', p. 37.

³⁷ See Thom Brooks, 'Punishment: Political, Not Moral', *New Criminal Law Review* 14 (2011), pp. 427—38.

institution. But it still runs the risk of being too conservative if it endorsed a criminal code because it existed. We require an approach that can connect to our practices while able to speak to their development.

A possible illustration of such an account might be Richard Dagger's republican view of criminal law.³⁸ Republicanism understands freedom as non-domination.³⁹ We are dominated when we are subjected to an arbitrary power. A benevolent dictator that never caused us harm or threatened others would still dominate because he would retain the power to arbitrarily harm or threaten us. We enjoy republican freedom when the laws that bind us are not arbitrarily governing us, but discursively controlled through deliberative self-government. We are not dominated when we can exercise this type of control. State punishment for murder is not a form of domination where our community chose this sanction through public deliberation open to all citizens. Punishment is not an imposition of one arbitrary will over others, but a product of deliberation where each individual may contribute. We are the collective authors of our laws in republican theory.

Dagger claims that crimes are one of many forms whereby an individual can exercise arbitrary power over another. Crime is not a private matter between affected persons, but 'an important part of the public's business' as a real threat to the liberties of all.⁴⁰ For Dagger, republicanism is about the rule of law and republicanism's understanding of criminal law is an example of this view.

One interesting consequence is that Dagger's republicanism appears to reject a key part of perhaps the most well known republican theories of criminal justice, namely, John

³⁸ See Richard Dagger, 'Republicanism and the Foundations of Criminal Law' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 44—66.

³⁹ See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

⁴⁰ Dagger, 'Republicanism and the Foundations of Criminal Law', p. 48.

Braithwaite's defence of restorative justice.⁴¹ Restorative justice is an alternative to the formal trial process. Instead of the adversarial courtroom determining sentencing, restorative justice is an informal process bringing together the victim, offender and their support networks led by a trained facilitator. The aim is to create a dialogue fostering mutual understanding and healing. Offenders must accept their guilt to participate and typically apologise to victims. Their punishment is not determined by a judge, but through deliberation in a restorative setting to help 'restore' the offender as a law-abiding member of our community. Braithwaite defends restorative justice as republican because it is a deliberative process without domination. But Dagger likely rejects this because restorative justice removes such cases away from the public trial to the private meeting room.⁴²

But Dagger need not do so. Restorative justice empowers the public by giving those with a stake like victims, offenders and their families a say.⁴³ Outcomes are not imposed from above, but a product of deliberation from below. No one is coerced to participate unlike a criminal trial.⁴⁴ Restorative justice can shrug off the less flexible but heavier weight of state power in favour of a more flexible and better tailored to serving public justice. Studies have found that using restorative justice can yield several improvements over courtroom sentencing: there is much higher participant satisfaction, lower reoffending of up to 25% and significant cost savings.⁴⁵ This is not to say restorative justice is perfect or in no need of

⁴¹ See John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990) and see also John Braithwaite, *Restorative Justice and Responsible Regulation* (Oxford: Oxford University Press, 2002).

⁴² These claims follow from Dagger's arguments in this chapter. Surprisingly, he makes no reference to restorative justice despite mentioning Braithwaite several times. See Dagger, 'Republicanism and the Foundations of Criminal Law', pp. 45, 52, 66.

⁴³ See Thom Brooks, 'Stakeholder Sentencing' in Julian Roberts and Jesper Ryberg (eds), *Popular Punishment: On the Normative Significance of Public Opinion for Political Theory* (Oxford: Oxford University Press, 2014), pp. 183—203.

⁴⁴ Typically, if an offender refuses to cooperate at a restorative justice meeting or fails to honour a restorative contract agreed at it, then he may be coerced to sit as a defendant at a courtroom trial. However, participation in restorative justice is always voluntary for every one concerned.

⁴⁵ See Joanna Shapland and Gwen Robinson, *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders* (London: Routledge, 2011).

further reform, as I have argued for elsewhere.⁴⁶ But it is to say restorative justice is compatible with republican theories of criminal law among other theories.

Conclusion

This review article has surveyed the contributions to Duff and Green's fascinating *Philosophical Foundations of Criminal Law* by considering how its chapters address an important issue in the philosophy of criminal law. This issue concerns the relation of morality to the criminal law. I first discussed legal moralists like Duff that defend a strong connection between law and morality. I argued this perspective is not compelling. It rests on problematic assumptions about social morality, the moral content of the criminal law and the importance of context. I next explored alternatives advancing a more political understanding that seem to overcome the problems faced by legal moralism. While my discussion is not exhaustive, it should make clear that the balance between theory and practice to be struck as noted in Duff and Green's introduction is not achieved by legal moralists. Whatever else the philosophical foundations of criminal law, legal moralist theories are too disconnected from our practices to foster a compelling view of the criminal law.⁴⁷

To conclude, this critical comment is not a criticism of Duff and Green's book. Instead, it is a statement about the wider field of the philosophy of criminal law that the book's contents contribute towards. Duff and Green should be congratulated for producing the best collection available on this topic encompassing a range of interesting and sometimes competing voices that will be of enormous benefit to anyone with an interest in the topic.

⁴⁶ See Thom Brooks, 'On Punitive Restoration', *Demos Quarterly* 2 (2014), pp. 41—44.

⁴⁷ For a more compelling alternative, see Thom Brooks, 'Unified Theory' in *Punishment*, pp. 123—48.

Thom Brooks

Law School, Durham University

thom.brooks@durham.ac.uk